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COMMENTS

JOINT AND MUTUAL WILLS*

I. ACTIONS FOR BREACH OCCURRING WHILE BOTH PARTIES ARE STILL ALIVE

Clearly the parties to a contract for the execution of a joint and mutual will can, acting together, revoke such will and rescind the contract without incurring any liability for breach, provided the agreement did not create any rights in a third party beneficiary.¹ There are conflicting decisions, however, in respect to the right of a testator to revoke or revise the terms of his jointly executed will, notwithstanding the existence of a valid contract between the parties, during the lifetime of the other party, but without such other party's consent. Logic supports the view that, assuming the other party has lived up to the agreement, a revocation of the will by one of the parties under such circumstances is a breach of contract irrespective of whether the revocation is upon notice to the other party.² There is support, however, for the rule that a joint will, executed pursuant to a contract, can be revoked by one party while the other is still living without committing a breach of contract of which equity will take cognizance to require specific performance, provided notice of such revocation is given to the other party or he has acquired knowledge of the revocation in some other manner.³

The foregoing rule that permits a revocation of the will by either party during the joint lives of the parties is, as observed from the statement of the rule, ordinarily conditioned upon notice to the other party. Moreover, there are authorities which directly support the view that neither party is to be permitted to repudiate his contract to make a joint will, by revoking his will drawn pursuant thereto, in the absence of notice to the other party.⁴ Such view is deemed particularly pertinent where the testators are husband and wife.⁵ It has been held that the burden of proof on the issue of notice rests upon the party who relies upon the revocation of the will, at least where the proof is entirely in his control.⁶ In other cases, however,

* The first installment of this article appears in 38 MARQ. L. REV. 30 (1954).

¹ *Stewart v. Todd*, 190 Iowa 283, 173 N.W. 619, 180 N.W. 146, 20 A.L.R. 1272 (1919).

² *Canada v. Ihmsen*, 33 Wyo. 394, 240 P.927, 43 A.L.R. 1010 (1925).

³ *Hale v. Campbell*, 44 F.Supp. 772 (D.C. Iowa 1932); *Kingsbury v. Kingsbury*, 120 Misc.362, 198 N.Y.S. 512 (1923).

⁴ *Wright v. Wright*, 215 Ky. 394, 285 S.W. 188 (1926); *Robinson v. Mandell*, 3 Cliff.169, Fed. Cas. No. 11,959 (1868).

⁵ *Curry v. Cotton*, 356 Ill.538, 191 N.E. 307 (1934).

⁶ *Ibid.*

the courts have said that the will may be revoked or rendered unenforceable, without a requirement that notice be given.⁷

Full knowledge of the fact of revocation is the equivalent of notice, or as sometimes stated, excuses the failure to give notice.⁸ Also according to some authority, the surviving testator has no complaint on the ground of lack of notice of the revocation by the other testator, where such revocation was accomplished by a later will of which the survivor obtained knowledge on the other's death. This on the theory that the survivor, having the opportunity to revoke his own will upon being thus advised that the other party had revoked his, is not prejudiced by reliance upon the contract executed by the parties.⁹

Whether joint testators, who have not revoked their wills, are restricted from disposing of their property during their respective lifetimes is a question primarily of the construction of the agreement under which the will or wills were executed. It may be stated generally that the courts do not consider that the parties to a joint will intended to restrict either from disposing of property in good faith¹⁰ by transfers effective during his or her lifetime, unless a plain intention to this effect is expressed in the will or in the contract pursuant to which it was executed.¹¹ In general, no such restriction exists where, under the contract and will executed pursuant thereto, each testator designates the property to be devised as that belonging to him at the time of his death.¹²

If a third person, who has received property in a gift effected by the deceased joint testator during his lifetime in violation of the right of the surviving party, has converted it to his own use so that it may not be delivered in kind to the surviving party, the latter will be entitled to full compensation in an action for damages.¹³ A contract between husband and wife by which they undertake respectively to bequeath a specified property to each other so that it shall vest in the survivor during his lifetime and shall then vest in and belong to a third person, is not necessarily breached by the subsequent execution of separate wills wherein the spouses bequeath such property directly to the third person.¹⁴ The expression of a desire to rescind is immaterial where wholly unexecuted, at least immaterial after the

⁷ Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573 (1869); Peoria Human Soc. v. McMurtrie, 229 Ill. 519, 82 N.E. 319 (1907).

⁸ Lolly v. Cronen, 247 N.Y. 58, 159 N.E. 723 (1928).

⁹ *Supra*, note 2.

¹⁰ See Sparks, *Legal Effect of Contracts to Devise or Bequeath*, 53 MICH. L. REV. 1 (1954) on the question of what constitutes good faith.

¹¹ Rastetter v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915).

¹² Sample v. Butler University, 217 Ind. 122, 4 N.E.2d. 545, 5 N.E.2d. 888, 108 A.L.R. 857 (1937).

¹³ Wright v. Wright, *supra*, note 4.

¹⁴ Getchell v. Tinker, 291 Mich. 267, 289 N.W. 156 (1939).

survivor has accepted the benefits of the deceased party's will executed pursuant to the contract.¹⁵

II. BREACHES OCCURRING IN THE WILL OF THE FIRST TO DIE AND BY INTER VIVOS ACTS OF SURVIVOR

Where a party to a contract to make joint wills commits a breach of the contract by executing a new will with provisions different from the original contract, the survivor, upon proof of continued performance thereof, in good faith, on his or her part, is entitled to specific performance as against any heirs, devisees, legatees or executor under the breaching or revoking will of the deceased testator.¹⁶ It can also be said that equity will not permit one of the parties to rescind the contract by his own act in conveying the property, contrary to the terms of their agreement, after the death of the other party.¹⁷ In point of time, these are the only two types of breach that can be considered when only one of the parties is still alive.

An interesting problem is suggested by the rule that a devise or legacy bequeathed to a person individually and not jointly with others lapses upon the death of the donee in the lifetime of the testator, unless the testator has indicated a contrary intent or a statute changes the result.¹⁸ Applying such principle to our joint will situation, nothing would pass under the will of the survivor of the joint testators who have executed wills by which each devised and bequeathed to the other all of his property, since the bequest to the first testator to die lapsed upon his death. The problem is important here because it could be offered as a defense, by the estate of the survivor, in an action for a breach allegedly perpetrated by the survivor. Statutes have been enacted in many jurisdictions designed to prevent, under certain circumstances, the application of the rule by providing that in such contingency, the heirs or issue of the deceased donee shall take in the absence of the testator's intention to the contrary. The problem ordinarily arises where the wills are those of husband and wife and one of the spouses has died leaving his entire estate to the other. The question then is whether, upon the death of the latter, the heirs or issue of the former will take the entire estate under the statute as heirs of a donee whose death has preceded that of the testator. According to some authority, joint wills making no provision for a third person, either absolute or conditioned upon the death of both testators in a common disaster, constitute in effect a single will, being the will of the first to die, and have no existence as the will of the

¹⁵ *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831, 64 A.L.R. 180 (1929).

¹⁶ *Supra*, note 4.

¹⁷ *Carmichael v. Carmichael*, 72 Mich. 74, 40 N.W. 173 (1888).

¹⁸ *Hoermann's Estate*, 234 Wis. 130, 290 N.W. 608 (1940); *Cleaver v. Cleaver*, 39 Wis. 96, 20 Am. Rep. 30 (1875).

surviving testator.¹⁹ In other words, the rights of the one testator in the estate of the other are made to depend solely upon his or her surviving the other.²⁰ The property of the first testator to die passes to the surviving testator and upon the death of the latter, without having executed a second will in the meantime, the property passes to his or her heirs as intestate property. The view is that an antilapse statute raising the presumption that a testator intends his bequest to go to the heirs of the devisee in case the devisee predeceases him, in the absence of a contrary intent shown in the will, does not apply so as to permit the heirs of the testator who died first to take under the will of the testator whose death occurred later, since there is in reality no will to which the statute can apply.²¹ To say that it was intended that the agreement was to bind the survivor by his own will, so as to permit his estate to pass to the heirs at law and distributees of the first to die, to the exclusion of his own next of kin, is to reach a result which is unnatural and unreasonable. It is apparent that this latter view overrides the parties' express intention to make joint wills. No Wisconsin decision has been found on this exact point.

The surviving testator is under an irrevocable obligation upon the death of the other party testate, where the agreement of the two testators created rights in third party beneficiaries, at least where the survivor accepts the benefits of the provisions of the will, of the other contracting party, in his favor.²² In some cases it has been held that, if the survivor threatens to dispose of property in violation of the provisions of the will, he can be enjoined from doing so at the instance of one who would be prejudiced thereby. To this effect is an Iowa case²³ in which an injunction was granted restraining the survivor from making other dispositions of her land by deed or will. Having accepted the property of the deceased testator on his death, the court held that the survivor was estopped from disposing of the property contrary to the agreement. All Wisconsin cases on this point stress the fact that benefits have been accepted by the survivor.²⁴ The issue presents itself as to what the effect of this language would be in a case where, for instance, a surviving wife elects to take against the joint will. In such a situation she could not be accepting benefits under her husband's will. Is this a method of getting around the restrictions of a joint will when the husband dies first? Stated another way, will equity act only when the surviving wife has accepted benefits

¹⁹ *Maurer v. Johansson*, 223 Iowa 1102, 274 N.W. 99 (1937), construing Iowa Code §11,861.

²⁰ *Wilson v. Starbuck*, 116 W.Va. 554, 182 S.E. 539 (1935).

²¹ *Supra*, note 19.

²² *Smith v. Thompson*, 250 Mich. 302, 230 N.W. 156, 73 A.L.R. 1389 (1930).

²³ *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N.W. 56 (1915).

²⁴ *Doyle v. Fischer*, 183 Wis. 599, 605, 198 N.W. 763 (1924), *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831 (1929).

under the will of her husband? No cases have been found on this point.

III. ACTIONS OCCURRING BECAUSE OF SURVIVOR'S WILL

An agreement to make joint wills for the benefit of third persons is in effect a contract to bequeath or devise property at the death of the promisor and should be so construed.²⁵ But a release by a third party beneficiary under a joint will, whereby such beneficiary purports to discharge all claims against the surviving testator, constitutes a defense to an action alleging breach by execution of a new will, by the estate of the surviving testator, at least where the beneficiary had knowledge of the contract when he executed the release.²⁶ There is some authority to the effect that a claimant, under a contract by his father and mother to make joint wills benefiting claimant, might be estopped from claiming under the contract by his act in petitioning for the appointment of an administrator of his father's estate as an intestacy.²⁷ Such view, however, was apparently based on the particular facts that claimant had no training in the law and had been advised by the probate judge that a subsequent marriage by the surviving father was a revocation of the will of the survivor. In reality, it does not seem that claimant's action in that case was inconsistent with his rights to claim benefits under the contract.

It has been held by some courts that a subsequent marriage of a surviving testator, although operative under the statute of the jurisdiction to revoke his will, does not relieve him from the obligation of the contract or prevent its enforcement in equity when he dies leaving a new will,²⁸ especially where the contracting parties were husband and wife and the agreement was entered into for the purpose of providing for the children of each of them by prior marriages.²⁹ The second wife of a surviving testator, who had executed a will jointly with his first wife and subsequently executed a new will, stands in no better position than her husband, and is estopped to abrogate the agreement after the husband has secured the probate of the will as the will of his first wife and has accepted the benefits thereof, where the facts within her knowledge at the time she contracted the marriage were sufficient to give her notice or put her upon inquiry respecting the rights of third-party beneficiaries.³⁰ It has also been held that the surviving testator can be held to the terms of the joint will only insofar as he or she is bound by the contract; and if a third-party beneficiary has received, prior to the

²⁵ *Zabel v. Stewart*, 153 Kan. 272, 109 P.2d 177 (1941).

²⁶ *McWhorter v. Humphreys*, 161 S.W.2d. 310 (1942).

²⁷ *Mosloski v. Gamble*, 191 Minn. 170, 253 N.W. 378 (1934).

²⁸ *Ralyea v. Menners*, 155 Misc. 539, 280 N.Y.S. 8 (1934).

²⁹ *Ibid.*

³⁰ *Larrabee v. Porter*, 166 S.W. 395 (Tex. Civ. App. 1914).

death of the survivor that to which he was entitled under the joint will, he can have no complaint of which the law will take cognizance concerning the dispositions made, by the surviving testator in a new will, of other property received by the latter under the provisions of the joint will.³¹ Where the testator last surviving has the power, under a contract to make a joint wills, to determine the distribution to be made of a portion of the combined estates within a class of beneficiaries, executes a will for that purpose and later revokes it, the revoked will is without effect in determining who are to take as beneficiaries upon the enforcement of the contract in equity.³² If the testatrix last surviving dies without exercising further the power thus vested in her to determine the distribution, the court will exercise it for her on the basis of equality, but not of literal equality, among the members of the class, where the class is described as "next of kin" in the contract and the general policy of the state as stated in the statute on distribution of a decedent's estate calls for a division per stirpes among next of kin.³³

IV. REMEDIES FOR BREACH

The breach of a contract for the joint execution of a will should give rise to the same remedies as are employed in other cases of breach of contract to make a will, namely, an action at law for damages, and a suit in equity.³⁴ But, it is to be observed that the latter is the type of relief usually invoked.³⁵ In fact, according to some authorities, only a court of equity can take cognizance of an allegation that the revocation of a joint will by the surviving testator was in violation of his contract with the deceased testator.³⁶ Ordinarily however, the executor or administrator of the estate of the survivor is a necessary party to the enforcement of the contract.³⁷

The usual remedy is not in the contest of the probate of the will which constitutes the violation of which complaint is made,³⁸ since, in the absence of a statute giving the probate court equity powers, the main issue on a contested probate is whether the paper compounded is the last will of the decedent.³⁹ The probate court, whose jurisdiction at this stage is limited to the determination of such issue, lacks power to enforce an agreement between the two testators.⁴⁰ Nor can such

³¹ 169 A.L.R. 49.

³² 169 A.L.R. 37.

³³ *Ibid.*

³⁴ *Curry v. Cotton*, *supra* note 5.

³⁵ 28 HARV. L. REV. 215.

³⁶ *Re Rolls*, 193 Calif. 594, 226 P.606 (1924); *Re Harris*, 9 Calif. 2d. 694, 72 P.2d. 873 (1937).

³⁷ *French v. French*, 148 S.W.2d. 930 (Tex. Civ. App. 1941).

³⁸ *Re Sandburg*, 75 Misc. 38, 134 N.Y.S. 869 (1911).

³⁹ *Chitwood v. Collins*, 122 W.Va. 267, 8 S.E.2d. 830 (1940).

⁴⁰ *Clements v. Jones*, 166 Ga. 738, 144 S.E. 319 (1928).

jurisdiction be conferred by the consent of the parties.⁴¹ The proper procedure would seem to require that claimant file his claim in the probate court, and at the same time start his action in equity to determine his rights under the contract. Most courts have held that the establishment of a trust for the purpose of enforcing a contract such as this is not ordinarily within the jurisdiction of the probate court.⁴² Beneficiaries under joint wills have available the remedy of specific performance.⁴³ But, where the contract has been violated by the revocation of a will drawn in pursuance of the agreement, and the property has been converted so that delivery in kind cannot be made, equity may award damages in lieu of specific performance.⁴⁴ A decree probating the revoking will is not *res judicata* as to issues arising under the contract, but according to some authority, the revoking will must be probated before a suit to enforce specific performance of the agreement will be entertained.⁴⁵

Equity has adopted the expedient of declaring and enforcing a trust, in property received under the agreement by one of the parties who has violated the contract by revoking his will, for the persons entitled thereto under such contract.⁴⁶ Property in the hands of takers with notice of the first will, or in the hands of volunteers, is also impressed with a trust and may be subjected to the payment of compensatory damages to the other party to the contract.⁴⁷ A declaration of a trust will not be refused on the ground that the survivor of the testators, who violated the contract, has a larger personal estate than he received from the testator first to die, since a trustee is not permitted to convert trust funds on the chance that upon his death his personal estate may be sufficient to reimburse the trust estate.⁴⁸ Also, where a husband and wife made joint wills with an agreement that the survivor would bequeath the property received from the other to the heirs of the one dying first, the parents of the wife, who died first, as her heirs, were held entitled to establish a trust in the property after her death, at least in situations where the survivor is not acting in good faith.⁴⁹ A further remedy has been suggested by some authorities which gives support to the position that an injunction against the probate of a later will, which was executed by the survivor of the parties in violation of the agreement, will be granted to prevent a cloud on title.⁵⁰

⁴¹ Fuller v. Nelle, 12 Cal. App.2d. 576, 55 P.2d. 1248 (1936).

⁴² Tracy v. Donzinger, 249 App. Div. 46, 291 N.Y.S. 113 (1936).

⁴³ Doyle v. Fischer, 183 Wis. 599, 198 N.W. 763 (1924).

⁴⁴ Wright v. Wright, *supra* note. 4.

⁴⁵ Allen v. Bromberg, 147 Ala. 317. 41 So. 777 (1906).

⁴⁶ Allen v. Ross, 199 Wis. 162, 225 N.W. 831 (1921).

⁴⁷ Curry v. Cotton, *supra* note 5.

⁴⁸ Rastetter v. Hoennminger, *supra* note 11.

⁴⁹ 2 A.L.R. 1200.

⁵⁰ Child v. Smith, 225 Iowa 1205, 282 N.W. 316 (1938).

The question of proper or necessary parties in an action to enforce the contract, in most cases found, involves third persons either as third-party beneficiaries or persons claiming under such contract. As stated above, the executor or administrator is usually a necessary party.

A child who is a beneficiary under the will of his brother, and has obtained title to property devised by it, has been held to have a sufficient interest to enable him to maintain an action to enforce an agreement between his father and mother to make joint wills naming the deceased brother a beneficiary.⁵¹ And while it may be generally stated that equity will not proceed for the enforcement of such a contract at the instance of one who has only a nominal right thereunder, it has been held that a creditor of a third-party beneficiary has a sufficient interest.⁵²

V. CONCLUSION

It would appear that much of the litigation over joint wills could be avoided if proper attention is given by the scrivener to the contractual aspect. The approach to the task of drafting the will or wills should be made by ascertaining whether the prospective testators are agreed that the testamentary dispositions are to be made beyond the power to revoke unilaterally. The ordinary testator, being untrained in law, does not realize, in the absence of good legal counsel, the full significance of a contract to make wills with mutual and reciprocal provisions. Too often has the surviving testator learned to his regret at a late date that by reason of having obligated himself to keep his will in effect, it is beyond his power to benefit those persons who, under the circumstances of caring for him in his declining years, should receive the benefit of his testament.

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⁵¹ Doyle v. Fischer, *supra* note 45.

⁵² Morgan v. Sanborn, 225 N.Y. 454, 122 N.E. 696 (1919).